RECEIVED

APR 3 1997

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	**CC Docket No. 96-237**
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

BellSouth Petition for Reconsideration

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), hereby seeks partial reconsideration of the Commission's *Report and Order*[1] in the above referenced proceeding.

Specifically, BellSouth asks the Commission to modify that portion of its decision that obligates an incumbent local exchange carrier ("LEC") to "do what is necessary" to secure sufficient intellectual property rights from third parties to permit the LEC to extend those rights to qualifying local exchange carriers ("QLECs") pursuant to infrastructure sharing agreements.[2] The Commission's requirement is contrary to specific provisions of Section 259 of the Communications Act,[3] inconsistent with prevailing commercial practices regarding allocation of intellectual property rights, and not likely to achieve the Commission's objective. BellSouth

---

1 *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-237, *Report and Order*, FCC 97-36 (rel. Feb. 7, 1997) (*"Report and Order"*).

2 *Report and Order at* ¶ 70.

3 47 U.S.C. § 259.

therefore urges the Commission to revisit its decision and to modify it in accordance with the suggestions herein.

Background. Section 259(a) requires incumbent LECs to make available to QLECs "such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested" by a QLEC to provide telecommunications service or access to information service in the QLEC's service area.[4] In its *Report and Order*, the Commission observed that the "negotiation-oriented framework" it had adopted for achieving the objectives of Section 259(a) obviated the need for the Commission to attempt to delineate, even by example, the types of "infrastructure, technology, information, and telecommunications facilities and functions" that could be covered by a negotiated agreement.[5]

Nonetheless, the Commission expressed concern that the bargaining flexibility that would prove beneficial to the negotiation of all other aspects of an infrastructure sharing agreement somehow "would seem to exacerbate . . . disagreements . . . about intellectual property issues, specifically, where otherwise protectible intellectual property is owned or controlled by incumbent LECs and is properly sought by [QLECs]."[6] The *Report and Order* provides no explanation, however, of the basis for the Commission's apparent belief that incumbent LECs would be recalcitrant about granting intellectual property rights that they own or control while negotiating willingly and in good faith all other aspects of an infrastructure sharing agreement. Intellectual property rights owned or controlled by an ILEC are just as susceptible to negotiated sharing as

---

4 47 U.S.C. § 259(a).

5 *Report and Order* at ¶ 67.

6 *Report and Order* at ¶ 68.

are any other "infrastructure, technology, information, and telecommunications facilities and functions." Indeed, BellSouth does not dispute that a QLEC's rights to request and obtain through negotiation an infrastructure sharing arrangement with an incumbent LEC includes the right to negotiate and obtain the intellectual property rights *owned or controlled by the incumbent LEC* that are associated with the shared infrastructure. Accordingly, BellSouth disagrees with the Commission's presumption that negotiation of those rights needs special Commission attention.

Of even more concern, however, is the Commission's apparent belief that because incumbent LECs for some reason will be disinclined to negotiate with QLECs regarding intellectual property rights owned or controlled by the incumbent LEC, the incumbent LEC must be required "to seek, to obtain, and to provide necessary licensing" of *third parties'* intellectual property rights whenever those rights might be implicated by a negotiated infrastructure sharing agreement. Thus, according to the Commission, in such cases, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly" and otherwise "to do what is necessary" to ensure that QLECs receive the "benefits to which they are entitled under Section 259."[7] In BellSouth's view, this obligation not only improperly positions the incumbent LEC between the third party owner of intellectual property rights and the QLEC, buts also -- because of its open-ended nature -- conflicts with the Commission's own obligation under Section 259(b)(1) not to impose rules that require an incumbent LEC to take any action that is "economically unreasonable."[8] Accordingly, this portion of the Commission' decision must be reconsidered.

---

7 *Report and Order* at ¶ 70.

8 47 U.S.C. § 259(b)(1).

I. The Commission's Open-Ended Requirement Conflicts With the Commission's Responsibilities Under Section 259(b)(1).

Section 259(b)(1) ordains that regulations adopted by the Commission pursuant to Section 259 "shall not require a local exchange carrier to which this section applies to take any action that is economically unreasonable or contrary to the public interest."[9] Nonetheless, the Commission's requirement that incumbent LECs "do what is necessary" to secure licenses from third parties for the benefit of QLECs appears to be imposed without limitation on how far an incumbent LEC must go to satisfy that standard. Moreover, because third party holders of intellectual property rights will know that the incumbent LEC is bound by Commission order to "do what is necessary," the incumbent LEC may be forced to enter agreements that are economically unreasonable, contrary to Section 259(b)(1).

Obligating an incumbent LEC to obtain whatever rights are necessary to ensure that it can extend those rights to QLECs places third party holders of those rights in an extraordinary bargaining position. Knowing that the incumbent LEC is operating under a Commission-imposed burden to "do what is necessary," the third party rights owner would have the ability to extract royalty payments or other license fees from the incumbent LEC that are much higher than the commercial marketplace otherwise would support. An incumbent LEC facing such an inflated fee structure would seemingly have only two choices -- paying the inflated fee or ceasing to purchase or use the infrastructure or technology with which the third party's intellectual property is associated. Neither of these outcomes presents an economically reasonable result. The

---

9 47 U.S.C. § 259(b)(1).

Commission's requirement is thus contrary to Congress's admonition that the Commission's rules "*shall not require* [the incumbent LEC] to take any action that is economically unreasonable."

Even if a third party owner of intellectual property does not attempt to take undue advantage of the incumbent LEC's regulatory burden, the third party is still likely to require the incumbent LEC to pay higher fees than if the incumbent LEC were negotiating solely for its own needs. Because neither the incumbent LEC nor the third party will know at the time the incumbent LEC obtains intellectual property and associated rights from the third party whether or the extent to which QLECs will request infrastructure sharing arrangements that implicate those rights, the third party is likely to establish a higher fee structure to cover the *possibility* that additional carriers may be gaining access to and use of the intellectual property. If that possibility never materializes, the incumbent LEC will have overpaid for its rights -- again an outcome contrary to Section 259(b)(1). The Commission must modify its requirement so that it does not conflict with the statutory constraint of Section 259(b)(1).[10]

---

[10] The Commission's requirement also appears to be inconsistent with the limitation Congress imposed on the Commission in Section 259(b)(2). That section directs the Commission to adopt rules that "permit, but [do] not require, the joint ownership or operation of public switched network infrastructure or services" by an incumbent LEC and a QLEC. Thus, Congress clearly anticipated that incumbent LECs and QLECs might choose to enter contractual joint ownership or operating arrangements, which presumably would include the opportunity and perhaps need to jointly negotiate with third parties for any intellectual property licenses necessary to the joint arrangement. Yet, in the *Report and Order*, the Commission stated, "In cases where the only means available [for securing necessary licenses from third parties] is *including the qualifying carrier in a licensing arrangement*, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." *Report and Order*, at ¶ 70 (emphasis added). To the extent this requirement obligates an incumbent LEC to include a QLEC in some form of joint license arrangement, the requirement reaches beyond the Commission's authority under Section 259(b)(2) to impose only permissive regulations and must be modified.

II. The Commission's Requirement Inappropriately Interferes with the Proper Functioning of the Intellectual Property Marketplace.

Owners of intellectual property rights have protectible property interests rooted in the U.S. Constitution. The law and public policy have long dictated that holders of such rights should be free to extract their value through licenses and other fee-based arrangements. Further, holders of many such rights are granted effective monopoly status for some period of time. All of these long-standing policies are intended to encourage and reward continued innovation and invention. The Commission's requirement, however, infringes on these established public policy objectives.

The Commission's decision appears to rest, at least in part, on a presumption that QLECs will benefit from the ability of the incumbent LEC to negotiate "better" royalty or other license fee arrangements.[11] As noted above, because of the counterweight the Commission's "do-what-is-necessary" requirement would place on the incumbent LEC's bargaining position, the Commission's presumption is not necessarily supportable. Even assuming that it is, however, the Commission has provided no explanation of how it is in the public interest to undermine the third party intellectual property holder's right and opportunity to negotiate an arrangement that is best for it. Rather, the Commission's requirement makes an unsupported value judgment that a lower royalty arrangement is necessarily a good outcome for all involved.

---

[11] *Report and Order*, at ¶ 65 (citing AT&T's comments alleging that vendors would have little incentive to negotiate reasonable terms with small, rural carriers). The bargaining advantage conferred by the Commission's open-ended requirement undermines the Commission's presumption that incumbent LECs will be better positioned than QLECs to negotiate favorable license arrangements. A third party owner of intellectual property would have no incentive to offer its "best" terms to a presumably large incumbent LEC, knowing that the LEC is obligated to "do what is necessary" to secure the necessary licenses.

As the *Report and Order* seemed to acknowledge, the Commission has no jurisdiction over third party intellectual property holders or over the intellectual property itself.[12] Yet, the effect of the Commission's requirement would be directly to subject independent third parties and their rights in their own intellectual property to the full effects of the Commission's requirements. Thus, third parties are compelled to license or to permit sublicensing and are deprived of their right to negotiate directly with ultimate users of their intellectual property. Moreover, third party owners of intellectual property will lose privity of contract with users of that property and consequently have only indirect enforcement and remedial claims in the event of misuse of the intellectual property. Where the Commission does not have jurisdiction over the affected entities or their affected interests, it should be particularly circumspect before adopting regulations that have such a material impact on third parties and their rights.

III. The Commission Should Require an Incumbent LEC Only to Provide Sufficient Information for a QLEC to Negotiate Directly With a Third Party to Obtain any Necessary Intellectual Property Rights.

Rather than interposing an incumbent LEC between a third party owner of intellectual property and a QLEC that might have an interest in obtaining access to and the use of that intellectual property, the Commission should only require the incumbent LEC to ensure that the QLEC has information sufficient to pursue those rights directly. Such an approach is consistent with standard practice in the industry as well as with other existing regulatory and statutory provisions.

---

[12] *Report and Order* at ¶ 70 ("We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs.").

For example, today, when BellSouth hires a developer to develop software for it, BellSouth may negotiate to own the software product and all rights to it. However, the software generally is not necessarily delivered with any required run-time licenses to third party intellectual property. Rather, the software developer will generally work with BellSouth to identify any such third party licenses that BellSouth may need to obtain. It is then up to BellSouth to negotiate with the third part(ies) for any licenses necessary to take advantage of the new product it has purchased or in the alternative, to find a different supplier of functionally equivalent products.

The same practice should hold true under Section 259 infrastructure sharing agreements. An incumbent LEC that agrees to share infrastructure should not be obligated to actually obtain all potentially relevant licenses on behalf of a QLEC. Rather, the incumbent LEC should merely be required to ensure that the QLEC is given enough information from which it can determine whether it needs any license from a third party. The QLEC then should be expected to negotiate its own license arrangement with the third party or find another source to provide functionally equivalent products.

Such a procedure is also consistent with rules the Commission recently adopted regarding BOCs' network disclosure obligations under Section 251(c).[13] There, the Commission acknowledged that when third party proprietary information might otherwise be subject to disclosure by a BOC pursuant to its disclosure rules, the preferred course is to have a party

---

[13] *Implementation of the Local Competition Provisions of the Telecommunications Act,* CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order,* FCC 96-333 (rel. Aug. 8, 1996) (*"Phase II Interconnection Order"*).

interested in receiving that information negotiate directly with the owner of the information.[14] Indeed, the Commission's rules seem to contemplate that the owner of the information would be expected to release that information to the requesting carrier only pursuant to a licensing agreement or other arrangement designed to protect the owner's intellectual property interests. Similarly, it should be adequate in the current context as well for the incumbent LEC merely to refer the QLEC to the owner of the intellectual property at issue for direct negotiation of an agreement that protects the owner's intellectual property interests.

Finally, such an approach appears consistent with the structure and language of Section 259(c),[15] which addresses an incumbent LEC's obligation regarding disclosure of information to QLECs about planned equipment deployments and upgrades, including software. Specifically, that section requires the incumbent LEC to provide "timely information" on the planned deployment of services and equipment, "including any software or upgrades of software integral to the use or operation of such telecommunications equipment." The reference to "timely information" connotes Congress's concern that the QLEC have notice of proposed changes sufficiently in advance so that it can prepare itself for the changes. That Congress referred only to timely disclosure of planning information and did not require the incumbent LEC to ensure that a QLEC has the actual authority or capability to utilize any "software or upgrades of software" associated with the planned service or equipment deployment suggests that Congress did not

---

[14] *Phase II Interconnection Order*, at ¶ 257 ("If an interconnecting carrier or information service provider requires genuinely proprietary information belonging to a third party in order to maintain interconnection and interoperation with the incumbent LEC's network, the incumbent LEC is permitted too refer the competing service provider to the owner of the information to negotiate directly for its release.").

[15] 47 U.S.C. § 259(c).

intend for the incumbent LEC to assume any affirmative role in obtaining for the QLEC any equipment, services, or legal rights necessary to accommodate the incumbent LEC's planned changes. Rather, the timing structure set forth in Section 259(c) provides the opportunity for the QLEC to pursue for itself any licenses that may be necessary to use the "software or upgrades of software integral to the use or operation" of equipment that is being deployed by the incumbent LEC. The Commission should modify its requirement to be consistent with this section of the Act.

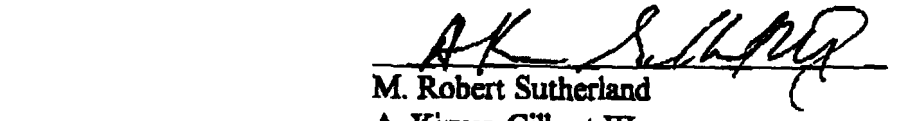
CONCLUSION

For the reasons set forth above, BellSouth urges the Commission to modify its requirement that incumbent LECs be responsible for obtaining intellectual property rights from third parties on behalf of QLECs and, instead, to require only that incumbent LECs provide QLECs with sufficient information for QLECs to pursue their own intellectual property licenses.

Respectfully submitted,

BELLSOUTH CORPORATION

By Its Attorneys



M. Robert Sutherland
A. Kirven Gilbert III

Suite 1700
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-3388

DATE: April 3, 1997